STATEMENT
OF
DALE CABANISS
CHAIRMAN
U.S. FEDERAL LABOR RELATIONS AUTHORITY

Before the

SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND AGENCY ORGANIZATION
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

On

Justice Delayed is Justice Denied: A Case for a Federal Employees Appeals Court

November 9, 2005

Chairman Porter, Ranking Member Davis, and Members of the Subcommittee:

Thank you for the opportunity to appear before you this morning as you examine the idea of creating a one-stop shop for the resolution of Federal employee complaints, appeals, and grievances. I applaud your continuing interest and efforts to evaluate ways to improve government operations, while retaining important due process rights for Federal employees. We believe that the proposal for a Federal Employees Appeals Court requires further study.

As you know, in 1978, the Civil Service Reform Act (CSRA) was enacted to replace a then-existing patchwork system of Federal employment governance. Chapter 71 of the CSRA (Statute) established the Federal Labor Relations Authority (FLRA) by consolidating three previously independent entities: the *Office of the General Counsel*, the *Authority*, and the *Federal Service Impasses Panel* (Panel). A fourth component of importance in our case processing is the Office of Administrative Law Judges (OALJ), appointed by the Members of the Authority. Under our Statute, the General Counsel, the Administrative Law Judges, the Authority, and the Panel retain the important statutory independence of their prosecutorial and adjudicative responsibilities, but co-exist in terms of managing administrative overhead.

The FLRA has a single administrative CEO, the Chairman, who is statutorily responsible for agency-wide budgeting and finance, human resources, procurement, information technology, and performance management. From this perspective, then, the FLRA does represent a "one-stop" shop in terms of a single point of entry for certain cases falling within our jurisdiction. During my term, and before, it has been our experience that each of these previously separate components has been able to successfully retain its respective statutory independence without the need for excessive duplicative administrative, budget, human resources, or technology personnel in each component.

As you are aware, the FLRA does not initiate cases. All proceedings before the FLRA originate from filings arising through the affirmative actions of Federal employees, Federal agencies, or Federal labor organizations. For example, an employee who believes he or she has suffered an alleged unfair labor practice (ULP) may petition the FLRA General Counsel (GC). The GC, through one of seven regional offices nationwide, will investigate. If the GC ultimately issues a complaint, the case moves to the Office of Administrative Law Judges (ALJs) where it will either settle or be scheduled for hearing. If the case moves to a hearing, it will either settle or the assigned Judge will issue a decision. Upon issuance of an ALJ decision, the non-prevailing party may then appeal to the FLRA Authority decisional component for adjudication. The Authority will issue a decision, after which judicial review may be had in either the U.S. Court of Appeals for the circuit in which the aggrieved party resides or conducts business, or in the U.S. Court of Appeals for the District of Columbia. [*See generally*, 5 U.S.C.A. §§ 7116(a)(1), (a)(4), 7118; 7105(a)(2)(G); and 7123(a)]

Examining this process more closely, a ULP case could potentially route through three of our agency's four major case-processing components (the OGC, the OALJ, and the Authority). Each component engages in case-processing activities that vary in complexity, time, and procedures. For fiscal year 2005, of 4,036 ULP charges filed with the OGC, 94% were withdrawn, dismissed, or settled. Of the 206 ULP cases within the OALJ, 65% closed before the hearing with 25% (54) decisions issued. For the Authority decisional component, 52 ULPs were received during the year with 32 procedural

closures and 23 merits closings (decision issued). The median age for merits decisions within the Authority was 142 days.

To address potentially lengthy case-processing and to improve the agency's overall responsiveness to its customers, during the past year, we began collecting baseline performance and activity-costing information and revising our internal performance standards. Consistent with all executive departments and many other small agencies, we soon will implement agency-wide processing goals that are aligned directly with our executives' and managers' performance appraisals. Thus, regardless of which component a case is currently in, we will remain cognizant that there is a customer (whether agency or union) waiting for not only a fair decision, but a timely result as well.

One of the issues that has been identified with respect to the employees appeals process is the potential overlap of jurisdiction and the opportunity to raise issues in alternative forums. This is not a significant issue at the FLRA. For example, Section 7116 of our Statute provides that "issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices." [5 U.S.C.A. § 7116(d)] This includes employment matters such as hiring, firing, and the failure to promote. These matters are generally subjected to the jurisdiction of the MSPB. Thus, if a federal employee initiates an employment action, the employee must decide whether to raise that action under the grievance procedure or as a ULP. Issues, which can properly be raised under an appeals procedure, generally may not be raised as an alleged unfair labor practice.

However, there are some instances in which different independent agencies could issue rulings involving the same employee complainant. For example, if a group of employees are terminated from federal service, they may appeal that termination to the MSPB. Depending on the factual situation, at the same time, the union representing that bargaining unit may file an unfair labor practice charge with the FLRA alleging the agency failed to follow the collective bargaining agreement in effecting the employment

action. The two cases are related, but because they raise different legal issues, there is the possibility of different rulings in different forums.

In another example, where a factual situation involves multiple related actions by an agency, it would be possible to litigate the various parts separately if different legal issues can be identified. For example, a bargaining unit employee could be terminated from federal service for insubordination resulting from his or her refusal to accept an overtime assignment. The bargaining unit employee could appeal the termination from federal service to the MSPB, while at the same time alleging an EEO violation for how he or she was treated during the investigation of the incident, while at the same time have the union representing this particular bargaining unit file an unfair labor practice charge alleging the employee was ordered to take the overtime assignment in reprisal for the employee's union activity. Because each piece of litigation raises a separate legal issue, each piece of litigation will operate independently of each other.

In conclusion, while there is not presently a great deal of overlap in jurisdictions between the FLRA and the other agencies represented here today, I am sure we would all agree there is room for continuous improvement administratively and operationally. Thank you again for the opportunity to appear this morning. I would be pleased to respond to any questions that you may have at this time or provide you any additional information you may seek.